CLERK'S COPY.

573

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 248. 45.

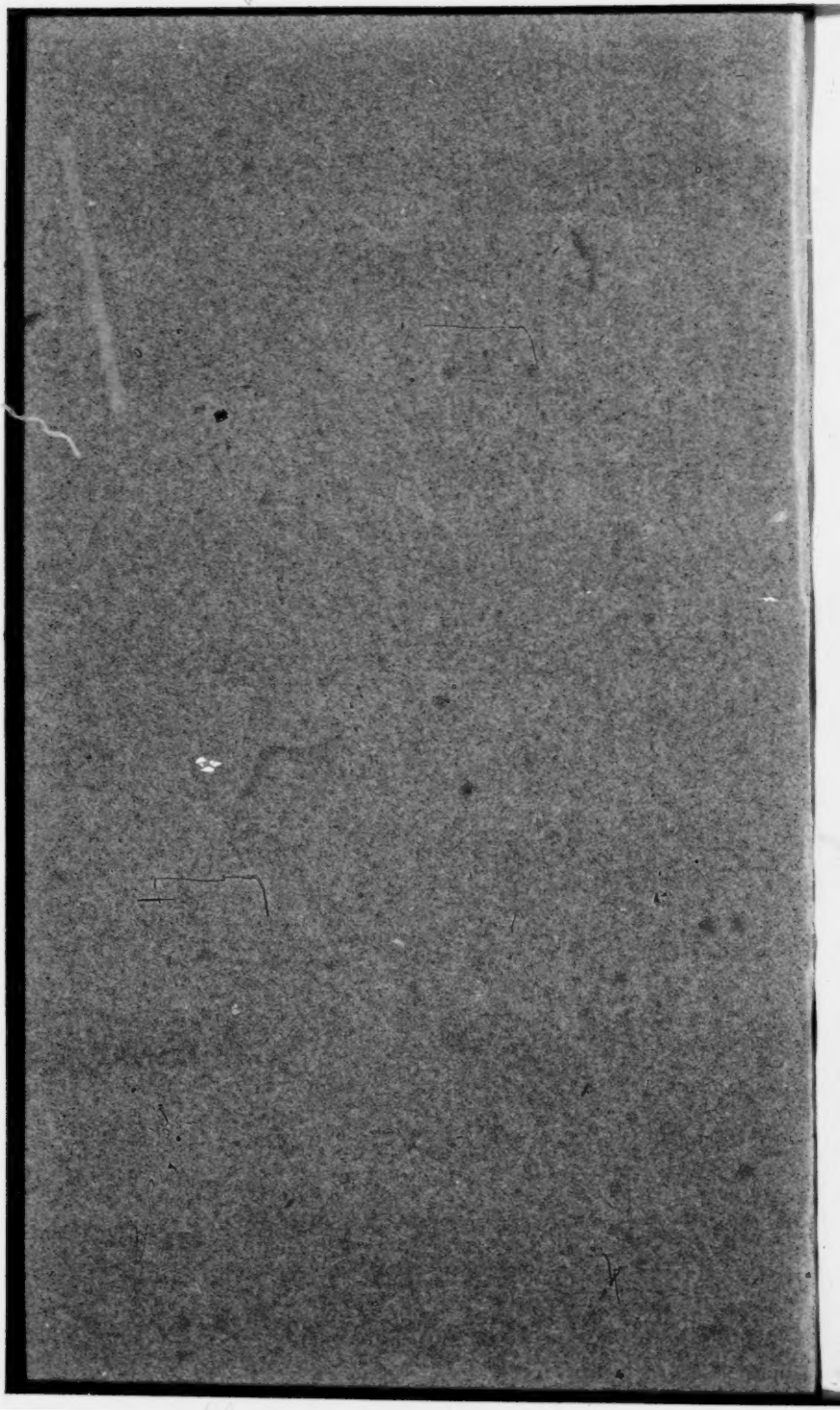
THE UNITED STATES, APPELLANT,

vs.

ARTHUR LYNAH ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED FEBRUARY 7, 1901.
(19,063.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 248.

THE UNITED STATES, APPELLANT,

vs.

ARTHUR LYNAH ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

INDEX.

	Original.	Print.
Caption	1	1
Petition and complaint	2	1
Plat of Verzenabie Plantation	7	4
Marshal's return of service	8	4
Answer	10	5
Marshal's return of service	12	5
Trial of cause	13	6
Findings of fact and conclusions of law	14	6
Order for judgment	22	10
Judgment	23	11
Assignment of errors and petition for writ of error	24	11
Order allowing writ of error	27	13
Opinion amending findings of fact	28	14
Writ of error	33	16
Citation	34	17
Service of citation	34	17
Clerk's certificate	35	17

23761—01——0

1 *Transcript of record.*

CAPTION.

The United States of America, district of South Carolina. In the circuit court, fourth circuit. To wit:

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, on the fourth Tuesday in November, 1899, before the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, holding said court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

vs.

THE UNITED STATES, DEFENDANT.

Be it remembered that heretofore, to wit, on the 4th day of February, 1897, came into court the said plaintiffs, petitioners, by their attorneys, Messrs. Bryan & Bryan, and filed their petition and complaint, which petition and complaint is in the words and tenor following:

2 *Petition and complaint.*

United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

against

UNITED STATES, DEFENDANT.

To the Circuit Court of the United States for the District of South Carolina:

The petition and complaint of plaintiffs above named, complaining against the United States, respectfully shows and alleges:

First. That the plaintiffs, your petitioners, are citizens of the United States, and reside as follows: Plaintiffs Arthur Lynah, J. H. Lynah, Edward Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, now reside in State and district of South Carolina; plaintiff James Lynah resides in the State of Maryland; plaintiffs Marie Glover Jenkins (born Lynah), and Kate McD. Cunningham (born Lynah), and Annie McD. Hopkins (born Lynah) reside in the State of Georgia.

Second. That your petitioners have a claim against the United
3 States of America under an implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

Third. That your petitioners were at the times hereinafter mentioned, and now are, owners as tenants in common of a certain plantation situated in the county of Beaufort, State of South Carolina, described as follows:

"All that plantation or tract of land called Vernezobre, situate, lying, and being on the Savannah River, in Saint Peters parish, Beaufort district, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of Brisbane; to the west on Savannah River, lands of Elliott Guerard and Daniel Heyward, esq.; to the south on lands of Daniel Heyward, Elliott Guerard, and Pringle Smith, esqs., measuring and containing two thousand one hundred (2,100) acres, more or less." A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, which is delineated on a map of said plantation and enclosed within red lines, hereto annexed and made part of this complaint, has been for seventy years and upwards a rice plantation on the Savannah Back River, with great labor and expenditure of money reclaimed and established and maintained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah River, and depending for its proper drainage and cultivation upon the maintenance of the natural flow of the said Savannah River in, through, and over its natural channel along its natural bed to the waters of the Atlantic Ocean.

Fourth. That for several years continuously, and now contin-
4 uously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States and by authority of the acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build, and maintain, and continuously since have been erecting, building, and maintaining, and are now building, erecting, and maintaining in and across the said Savannah River, in the bed of the said Savannah River, certain dams, training walls, and other obstructions, obstructing and hindering the natural flow of the said Savannah River through, in, and along the natural bed thereof and raising the said Savannah River feet at the point of and above the said obstructions and dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams, training walls, and obstructions, and at points above the said dams, training walls, and obstructions in said river.

Fifth. That the said dams, training walls, and obstructions have been and are being erected and maintained in the bed of said river at a great height at divers places in said river, below the said plantation of your petitioner'.

Sixth. That the effect of the said dams, training walls, and obstructions in said Savannah River upon the said four hundred and twenty acres,

being the rice lands, portions of the said plantation of your petitioners, commonly known as "Verzenobre," is that it backs the waters of the Savannah River in and upon the said plantation, and it raises and forces back the waters of the Savannah River at, in, and around and upon the said plantation to the height of about two feet over and above the
5 natural and ordinary level of the said Savannah River, existing at, in, and around the said plantation at the time of its establishment as a rice plantation and previous to the erection and maintenance of the said obstructions, training walls, and dams by the United States, and thus preventing the natural outflow of water from the said plantation necessary for the purpose of drainage and cultivation of said four hundred and twenty (420) acres, lands of said plantation, and preventing the established and proper inflow and outflow of the waters of the Savannah River necessary to the cultivation of the said four hundred and twenty (420) acres of lands of said plantation as a rice plantation, and further filling the ditches and saturating the lands with water and preventing the outflow of water from the said "Verzenobre" plantation and submerging and destroying the crops of and preventing the drainage of the said four hundred and twenty (420) acres of lands of said plantation for cultivation for any purpose whatsoever, and that by the said superinduced additions of water actually invading the said rice lands of said plantation, the said four hundred and twenty (420) acres of said plantation is permanently injured and effectually destroyed.

Seventh. And your petitioners further show that the said acts of the Government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah River at the port of Savannah, a port of entry of the United States and seaport of the United States of America, situated within the
6 State of Georgia, on the Savannah River, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River for the public use, purpose, and benefit of interstate and foreign and international trade and commerce, and for other public purposes, uses, and benefits.

Eighth. The plaintiffs, petitioners, further show and allege that by reason of the premises there is due and owing unto the plaintiffs, petitioners, by the United States for and in consideration of the facts hereinbefore alleged and the taking by the United States of the said four hundred and twenty acres, as aforesaid, of the said plantation for public uses and purposes, as in the manner and form heretofore alleged, the sum of ten thousand dollars ($10,000), the value of and lawful compensation for such property so taken as aforesaid.

Wherefore the plaintiffs, petitioners, pray judgment against the United States of America for the sum of ten thousand dollars ($10,000).

(Signed) BRYAN & BRYAN,
Attorneys of Plaintiffs, Petitioners, 11 Broad st., Charleston, S. C.

UNITED STATES OF AMERICA,
District of South Carolina:

Personally appeared Arthur Lynah, one of the plaintiffs, petitioners, herein and makes oath that the matters and things set forth and stated in the above complaint and petition are true to his own knowledge.

(Signed) ARTHUR LYNAH.

Sworn to before me this 30 day of January, 1897.

[SEAL.] (Signed) ARTHUR BRYAN,
Notary Public for S. C.

Filed Feby. 4, 1897.

(Here follows diagram marked p. 7.)

8 *Marshal's return of service.*

United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,
against
UNITED STATES, DEFENDANT.

Petition and complaint. Filed 4 February, 1897.

Affidavit of service.

Personally appeared H. J. Hickson, office dep. marshal U. S., district South Carolina, and makes oath that he served the above petition and complaint on Hon. W. Perry Murphey, district attorney of the United States for the district of South Carolina, by leaving a certified copy of the same with him, at the office of the U. S. district attorney, Charleston, S. C., on the 4th day of February, 1897, and deponent is not a party to or interested in the result of this action.

Deponent further makes oath that he mailed a certified copy of the said petition and complaint by registered letter to the Hon. Judson Harmon, Attorney-General of the United States, by depositing the same, enclosed in an envelope, in the post-office at Charleston, S. C., on the 4th day of February, 1897, addressed "Hon. Judson Harmon, Attorney-General of the United States, Washington, D. C.," postage prepaid.

(Signed) H. J. HICKSON,
Office Deputy U. S. Marshal.

9 Sworn to before me this 4th day of February, 1897.

[SEAL.] C. J. MURPHY,
Dpty. C. C. C. U. S., Dist. S. C.

Filed Feby. 4, 1897.

10 *Answer.*

The United States of America, district of South Carolina, fourth circuit.
In the circuit court.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Kate McD. Hopkins (born Lynah), plaintiffs, petitioners,
against
THE UNITED STATES, DEFENDANT.

The defendant, by Abial Lathrop, United States attorney for the district of South Carolina, answering the petition and complaint herein, alleges,

For a first defence to the alleged cause of action:

First. That this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and third paragraphs of the said petition and complaint.

Second. That this defendant denies all of the allegations contained in the second, fourth, fifth, sixth, seventh, and eighth paragraphs of the said petition and complaint except so much of the fourth paragraph as alleges that the said United States heretofore erected certain dams in the Savannah River pursuant to power vested in it by law, and except so much of the seventh paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents.

For a second defence to the alleged cause of action:

That the said alleged cause of action did not accrue within six years before the commencement of this action.

11 Wherefore this defendant prays judgment that the said petition and complaint be dismissed, and for the costs of this action.

(Signed) ABIAL LATHROP,
U. S. Attorney, Defendant's Attorney.

UNITED STATES OF AMERICA,
District of South Carolina:

Personally appeared before me Abial Lathrop, United States attorney, and made oath that the above and foregoing answer is true of his own knowledge.

ABIAL LATHROP.

Sworn to before me this 20th day of August, 1897.

[L. S.] ROBERT LIDE,
U. S. Commissioner.

12 Service acknowledged 21 August, 1897.

BRYAN & BRYAN,
Attys. Plaintiffs, Pets.

Marshal's return of service.

Paul Moore, office deputy U. S. marshal, being duly sworn, says that he served a copy of within answer personally on J. P. K. Bryan, esq., of

the firm of Bryan & Bryan, attorneys at law, at Charleston, S. C., on the 21st day of August, 1897.

PAUL MOORE,
Office Deputy U. S. M.

Sworn to before me Aug. 21, 1897.

C. J. C. HUTSON,
Clerk U. S. D. C., S. C.

Filed Aug. 21, 1897.

13 *Trial of cause.*

At a stated term of the circuit court begun and holden at Columbia, S. C., on the fourth Tuesday in November, 1899, and adjourned to Charleston, S. C., on the 24th day of January, 1900, this case came up for trial before the court, upon the testimony, proofs, and pleadings, and after hearing the same and the arguments of counsel, the court took the case under advisement.

And thereafter, to wit, on the 8th day of August, 1900, the court filed the following findings of fact and conclusions of law:

14 *Findings of fact and conclusions of law.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit. At law.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,
vs.
THE UNITED STATES, DEFENDANT.

This is a proceeding under the act of Congress, March 3, 1887, giving this court coordinate jurisdiction with the Court of Claims in certain causes of action against the United States. The object of the proceedings is to obtain just compensation for certain lands alleged to have been taken by the Government for public purposes. The cause of action is on the implied contract arising from such alleged taking to give just compensation therefor, under the fifth amendment.

The cause being at issue was tried by the court, in accordance with the act of Congress, without the aid of a jury.

FINDINGS OF FACT.

I. The above petition was in compliance with the requirements of act of March 3rd, 1887, chapter 359, duly filed in the clerk's office, circuit court of the United States for the district of South Carolina, on
15 the 4th day of February, 1897, and copies thereof duly served on the United States district attorney and the Attorney-General of the United States, and said law in all respects complied with.

II. The plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan M. Lynah, Kate McD.

Cunningham, Marie Glover Jenkins, Annie McD. Hopkins, are the children and sole heirs at law and distributees of Edward Lynah, deceased.

III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, was the owner in fee simple of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the lords proprietors of South Carolina in 1736.

IV. A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River and its ditches, drains, and canals, through and by which the waterf of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah River, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel along its natural bed to the waters of the ocean.

V. This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein.

The outer opening of the trunk was about a foot or a little less
16 above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlet of the trunks or waterways should always be above the mean low-water mark.

VI. These lands were granted by the lord proprietors of Carolina in 1736, and lie on the Savannah Back River, a tidal fresh-water stream, and are adapted by relation to their level of the cultivation of rice, under the natural flow of the Savannah River along its natural bed to the sea. The whole rice culture of South Carolina is founded upon this system, and the policy of the colony and the State has been to grant such lands for rice culture; and, inasmuch as it is necessary to have the lands absolutely dry to prepare the same for planting and to plant the rice crop, which is afterwards flowed while the rice is growing, and again dry while the rice is being harvested, the State has, by severe penal laws, for one hundred and fifty years protected such rice lands from destruction by continual inundation by backing up water or keeping surplus water on the lands by stopping the course of any water in its natural flow. (Revised Statutes of South Carolina, secs. 1264 to 1267.)

It appears from the plats among the muniments of plaintiffs' title that these rice lands were reclaimed and enclosed and in a state of culture one hundred and twenty years ago, and probably longer.

VII. For several years last past and at the present time the Government of the United States, under its proper officers, authorized thereto by act of Congress, have been engaged in the improvement of the navigation of the Savannah River, a navigable water of the United States, this

improvement being carried on by virtue of the provisions of section 8, Article I, of the Constitution, giving to the Congress the power to regulate commerce.

17 VIII. In thus improving navigation of this navigable water the United States has built and maintained and is now building and maintaining in and across the Savannah River, in the bed thereof, certain dams, training walls, and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of said river above said obstructions and causing its waters to be kept back and to flow back and to be elevated above its natural height in its natural bed.

IX. This rice plantation Vernezobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah River at this plantation and to keep the point of mean low water above its natural point, so that the outlet of the trunks and waterways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point. Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about eighteen inches thereby. By reason of this it gradually became difficult and has now become impossible to let off the water on this plantation or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation, and impossible to be cultivated in rice.

X. By the raising of the level of the Savannah River by these dams and obstructions the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about eighteen inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is

18 thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value.

XI. By reason of this superinduced addition of water actually invading the said rice plantation and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.

XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, and the invasion of these lands by this superinduced addition of water at and in the plantation as above described, rendered necessary by the execution of the Government's plans, the United States is not in actual possession of these lands.

XIII. Up to this time no other use has been discovered for these lands than for rice culture, and the direct results above stated have totally destroyed the market value of the lands. They now have no value.

XIV. The value of these rice lands before the obstructions aforesaid

were put into the river was about thirty dollars per acre—between twenty-five and thirty dollars per acre. The value of the rice plantation, 420 acres, thus destroyed is ten thousand dollars.

XV. The dams and obstructions built in Savannah River by the Government of the United States were for several years being continuously erected, the height of the water gradually being increased and the injury to the plantation gradually progressing, destroying its cultivation in successive fields. Its greatest height was reached about 1895, and within six years of the commencement of this action. The gradual
19 effect of the dams and obstructions and jetties did not result in a final condition of complete destruction and an enforced abandonment of this rice plantation and practical and actual ouster of plaintiffs until 1895, and within six years of the commencement of this action.

CONCLUSIONS OF LAW.

I. The cause of action accrued within six years of the commencement of this action.

II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (Monongahela N. Co. vs. U. S., 148 U. S., 336–7.)

III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.

IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor; and can not, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (Gibson vs. The U. S., 166 U. S., 269.)

V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions
20 on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. "It would," says Mr. Justice Miller, "be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for

protection and security to the rights of the individual as against the Government and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use." Pumpelly vs. Green Bay Co., 13 Wall., 177, 178. In that case the backing up of water on land was held to be a taking.

VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason
21 of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. Pumpelly vs. Green Bay Co., 13 Wall., 182; Mugler vs. Kansas, 123 U. S., 668.

VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiffs' plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. Pumpelly vs. Green Bay Co., 13 Wall., 181.

VIII. The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land. This is estimated to be ten thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment.

(Signed) CHARLES H. SIMONTON,
Circuit Judge.

7 Aug., 1900.

Filed Aug. 8, 1900.

22 *Order for judgment.*

Let the plaintiffs have judgment against the defendant for the sum of ten thousand dollars ($10,000.00).

CHARLES H. SIMONTON,
Circuit Judge.

August 7, 1900.
Filed Aug. 8, 1900.

23 *Judgment.*

The United States of America, district of South Carolina. Circuit court, fourth circuit.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

versus

THE UNITED STATES, DEFENDANT.

Judgment by the court.

This action having been brought to a trial before the court and conclusions of facts and of law having been duly found and filed by the court on the eighth day of August, 1900, whereby ten thousand dollars was found to be due to the plaintiffs, Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), by the defendant, the United States, and an order to enter judgment accordingly was therein contained,

Now, on motion of Bryan & Bryan, attorneys for said plaintiffs, it is ordered that the said plaintiffs recover of the said United States the sum of ten thousand dollars so found, with fifty-three 40/100 dollars costs.

(Signed) BRYAN & BRYAN,
Petitioner Plaintiffs' Attorneys.

(Signed) J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Aug. 9, 1900.
Filed Aug. 9, 1900.

24 *Assignment of errors and petition for writ of error.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit, at law.

ARTHUR LYNAH, J. H. LYNAH, EDWARD LYNAH, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), plaintiffs, petitioners,

against

THE UNITED STATES, DEFENDANT.

To the Honorable, the Judges of the Circuit Court of the United States for the District of South Carolina:

The defendant, by counsel, respectfully assigns the following errors to the judgment and findings of the presiding judge in this cause:

I.

The court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of plaintiffs from their possession of the rice plantation in question.

II.

The court erred in holding as follows: "The facts found show that by reason of the obstruction in the Savannah River the water has been directly backed up against the embankments on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking."

III.

The court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of the said plantation for public use.

IV.

The court erred in holding that a riparian owner of rice lands dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river is entitled to compensation by the Government, under the fifth amendment to the Constitution, for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of the said lands destroyed.

V.

The court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

VI.

The court erred in holding as follows: "The plaintiffs are entitled to just compensation for the taking of the 420 acres of rice land."

5744

5743

FOLD OUT IS TOO LARGE TO BE FILMED

VII.

That the court erred in holding that the plaintiffs are entitled to recover upon the facts found by the court in this action.

VIII.

The court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

IX.

The court erred in failing to hold that plaintiffs' title to the rice land, lying between high and low water on a tidal river, was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation, without compensating the owners for damages resulting therefrom.

X.

The court erred in failing to hold that the damages resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property had always been subject.

XI.

The court erred in failing to hold that the complaint should be dismissed, with costs to the defendant.

27 Wherefore, for these and other errors apparent in the rendition of said judgment, the defendant, by counsel, prays a writ of error to said judgment, that the same may be allowed, and that a transcript of this record and proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, sitting at Washington in the District of Columbia.

And, as in duty bound, will ever pray, and so forth.

ABIAL LATHROP,
United States Attorney, Defendant's Attorney.

Service of a copy of the within assignments of error acknowledged by me this 2 day of Feby., 1901.

BRYAN & BRYAN,
Atty. for Petrs.

Filed Feb. 1, 1901.

Order allowing writ of error.

Writ of error allowed.

CHARLES H. SIMONTON,
U. S. Circuit Judge, Feby. 1, 1901.

Filed Feby. 1, 1901.

28 *Opinion amending findings of fact.*

The United States of America, district of South Carolina. In the circuit court.

ARTHUR LYNAH ET AL.
vs.
THE UNITED STATES.

This is an action tried in the circuit court, in the exercise of a jurisdiction coordinate, except as to amount, with that of the Court of Claims.

The plaintiffs claimed compensation for lands on the Savannah River taken by the Government in improving the navigation of that river.

It was tried, as the statute directs, by the court, without a jury. The case came on at the April term, 1900, of the court at Charleston, and was then taken under advisement. The term of the court at Charleston ended on the Monday preceding the third Tuesday in April of the same year. On this last-mentioned day the term for Greenville began. On 7th August, 1900, the Greenville term not having ended, the court filed its findings of fact and conclusions of law upon which verdict and judgment were entered for the plaintiffs. At the conclusion of the argument in April, counsel on both sides submitted in writing requests to find the facts and conclusions of law. Among the requests of the defendant was one that the court find as a fact that the land in question was between high and low water mark. This came under the consideration of the court, and it was fully under the impression that a finding of fact on that point had been made, as follows:

"IV. A certain parcel of this plantation, measuring about 420 acres, had been reclaimed by drainage and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah River, and its ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands and were then drained therefrom, were adapted to the natural level of the said Savannah River and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel, along its natural bed, to the waters of the ocean.

29

"V. This portion of the plantation dedicated to the culture of rice was protected from the river by an embankment. Through this embankment trunks or waterways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands, the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlet of the trunks or waterways should always be above the mean low-water mark."

The defendant, being satisfied that such finding has not been distinctly made, has submitted a motion for a new trial, for the purpose of getting such a finding of fact, or, in the alternative, that the court will amend the findings of facts on this point. It may be well to remark that no finding

on this point would have affected the conclusion of law reached by the court. The finding of facts show that plaintiffs and their ancestors had been in the actual, exclusive, pedis possessio of all this land, high
30 land and rice land, down to the embankment of the river at low-water mark, holding under a grant from the English Crown. This long-continued, actual, adverse possession would give a complete title as against the world.

With regard to the motion for a new trial.

Although this court is in the exercise of the jurisdiction of the Court of Claims, it does this in accordance with its own course of procedure. (Section 4, act March 3, 1887, 24 Statutes at Large, 505; U. S. vs. Chase, 155 U. S., 487.) When this motion for a new trial was made, not only was the term ended in which the case was tried, but the term within which judgment was filed had also ended. The motion comes too late. It is true that by section 1088 of the Revised Statutes a new trial can be granted at any time in the Court of Claims pending a cause or within two years after its adjudication, when the court is satisfied that any wrong, fraud, or injustice has been done the United States. But this provision seems to apply to the Court of Claims only. And this view is strengthened by the fact that the act of 1887, supra, in its 8th section, declares that section 1080 of the Revised Statutes (a section in the title fixing the jurisdiction of the Court of Claims) shall apply to cases under this act. The maxim expressio unius, &c., would seem to exclude the adoption of a provisions not expressly menti ned.

As to the proposed amendment. A question like this came up in Insurance Co. vs. Boon, 95 U. S., 111. A cause had been heard by the court without a jury. A judgment was rendered without a formal finding of facts. After the close of the term in which the judgment was entered, a motion was made to correct the record by incorporating into it, nunc pro tunc, a special finding of the facts upon which the judgment had been rendered. The case is carefully considered. The court
31 stating the question say: "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the term, and whatever may have been the rule announced in some old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term and directed to be entered and become of record as of a former term. * * * Generally it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form. But every court of record has power to amend its records so as to make them conform to and exhibit the truth. Ordinarily there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was." The amendment in that case was allowed, nunc pro tunc, it contradicting nothing in the record.

In the case at bar we have the notes of testimony showing that the question was made, the requests of defendant to find, and the recollection of the judge, and the proposed amendment contradicts nothing in the record. In re Wight (134 U. S., 145) is to the same effect. An amendment to the record was allowed in a criminal case. The court say, when the objection to the amendment is based solely upon the technical point that

the term has passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. This power, of necessity, exists in the district court, and its exercise must in great measure be governed by the facts of the case. An amendment will be allowed.

It is ordered that the fifth finding of fact be amended, nunc pro tunc, as follows: Strike out the first sentence and insert:

"That portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment."

CHARLES H. SIMONTON,
Circuit Judge.

25 January, 1901.
Filed Janv. 25, 1901.

33 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Arthur Lynah et al., plaintiff, and the United States, defendant, a manifest error hath happened, to the great damage of the said The United States, defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd day of March next, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 2nd day of February, in the year of our Lord one thousand nine hundred and one.

J. E. HAGOOD,
Clerk of the Circuit Court of the United States, Dist. South Carolina.

Allowed by

CHARLES H. SIMONTON,
Circuit Judge.

We acknowledge service of the within writ.

BRYAN & BRYAN.

Feb'y 2, 1901.

34 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Arthur Lynah, J. H. Lynah, Edward Lynah, James Lynah, Emma P. Lynah, Jane L. Lynah, Susan N. Lynah, Kate McD. Cunningham (born Lynah), Marie Glover Jenkins (born Lynah), Annie McD. Hopkins (born Lynah), Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 2nd day of March next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, fourth circuit, wherein the United States is plaintiff in error and you are defendant' in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles H. Simonton, judge of the circuit court of the United States, this 2nd day of February, in the year of our Lord one thousand nine hundred and one.

CHARLES H. SIMONTON,
Circuit Judge.

Feb'y 1st, 1901.

We acknowledge service of the within citation this 2 day of February, 1901.

BRYAN & BRYAN,
Attys. for Petitioners.

Filed in this office Feb. 2, 1901. J. E. Hagood, C. C. C. U. S., Dist. S. C.

35 *Clerk's certificate.*

The United States of America, district of South Carolina. In the circuit court, fourth circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, and of the judgment in the case of Arthur Lynah et al., plaintiffs, petitioners, against the United States, defendant, as directed by counsel for plaintiff in error, rendered as aforesaid, together with the proceedings had in the cause relating to same.

Given under my hand and seal of said court, at Charleston, S. C., in the district aforesaid, this 2nd day of February, A. D. 1901.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

36 Office Supreme Court of U. S. Received Feb. 7, 1901.

(Indorsement on cover:) File No. 18048. South Carolina C. C. U. S. Term No. 248. The United States, plaintiff in error, vs. Arthur Lynah et al. Filed February 7, 1901.